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July 17, 1996

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

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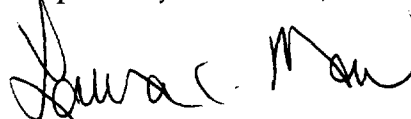
Re: PR Docket No. 89-552, RM-8506, *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking - Ex Parte Presentation of SMR Advisory Group, L.C.*

Dear Mr. Caton:

Jimmy Evans, Director of Strategic Development of SMR Advisory Group, L.C., ("SMR Advisory"), and I met today with Michele Farquhar, Chief of the Wireless Telecommunications Bureau, Rudolfo Baca of Commissioner Quello's Office, and John Cimko, Chief of the Policy Division of the Wireless Telecommunications Bureau to discuss the above-referenced Notice of Proposed Rulemaking and SMR Advisory's concerns thereof. The meetings focused on elimination of the forty-mile rule for the 220 MHz service and the discussion centered on the issues shown in the attached materials.

In accordance with Section 1.1206(a)(2) of the Commission's Rules, 47 C.F.R. §1.1206(a)(2), the original and one copy of this letter and the attachments thereto are being filed with the Acting Secretary of the Commission.

Respectfully submitted,



Laura C. Mow  
Counsel for SMR Advisory  
Group, L.C.

cc: Commission Personnel Named Above

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## **SMR Advisory Group, L.C.**

**PR Docket No. 89-552**

**Ex Parte Presentation**

### **The FCC Should Eliminate Section 90.739 of the Commission's Rules (the "220 MHz 40-Mile Rule")**

#### **I. Who Is SMR Advisory Group, L.C.?**

- SMR Advisory manages systems for approximately 90 independently-owned licensees on the east and west coast, with approximately 10 of these systems already constructed. At least 55 of these licensees (with constructed systems) would like to consolidate their systems into a single company to be owned by all of the licensees.
- Once combined, these systems would comprise a consolidated network which has been designed based on (i) commissioned economic analyses as to the most likely location of customer demand; and (ii) technical analyses of terrain features and other propagation effects showing projected coverage and capacity needs.

#### **II. Why The Concern With The "220 MHz 40-Mile Rule"?**

- Approximately one-third of the licensees who wish to contribute their licenses to the consolidated entity in return for an ownership share in that entity cannot do so because their systems are located within 40 miles of one or more other systems contemplated to be part of this network.
- In the Third Notice, the Commission stated that the 40 mile rule would be waived only when the licensee had demonstrated that there were outstanding requests for service, i.e., the first system in the 40-mile area must be fully loaded to capacity.
- Application of this standard would require that each license currently precluded by the 40-mile rule be folded one-by-one into the network as the first system within the 40-mile area achieves capacity loading. Implementation of a business plan in this manner is economically and technically inefficient, and administratively difficult to manage.

### III. What Is The Current Status Of The "220 MHz 40-Mile Rule"?

- By denying the requests of SunCom and Wireless Plus for waivers of the 220 MHz 40-mile rule, the FCC indicated that it intended to continue to apply Section 90.739 to Phase I Licensees.
- In its Third Notice, the FCC was unclear as to whether the "220 MHz 40-mile rule" would apply to Phase II Licensees, although based on the licensing and channel plan proposed by the Commission, it is difficult to see how this rule could be applied.
- Several commenters in this proceeding urged that the "220 MHz 40-mile rule" be eliminated. No commenters urged that this rule be retained.

### IV. Why Should The "220 MHz 40-Mile Rule" Be Eliminated?

- **The 220 MHz Service Will Be More Competitive.**  
Elimination of the "220 MHz 40-mile rule" will enhance the competitive potential of the 220 MHz service by enabling all 220 MHz licensee to configure their systems (through channel aggregation) in a more flexible way. The FCC has acknowledged that 220 MHz systems (and systems in other commercial mobile radio services, for that matter) are evolving toward wider area systems. These systems better serve the increasing mobile needs of the public. The "220 MHz 40-mile rule" impedes the development of these systems by Phase I licensees by requiring that they build a network piecemeal.
- **Regulatory Parity Will Be Served.**  
The Omnibus Budget Reconciliation Act of 1993 mandates regulatory parity for substantially similar services. The Commission has found that 220 MHz is substantially similar to other commercial mobile services, including in particular, the 800 MHz and 900 MHz SMR services.
  - a. **Parity Between 220 MHz and Other CMRS**  
The FCC has eliminated the 800/900 MHz SMR version of the 40-mile rule (Section 90.627(b)). There is no comparable restriction in other commercial mobile radio services, such as cellular, etc. Regulatory parity would dictate that the 220

MHz version of the 40-mile rule also be eliminated so as to enable all 220 MHz licensees to compete more effectively with these other commercial mobile radio services.

**b. Parity Between Phase I Licensees and Phase II Licensees**

To the extent that the "220 MHz 40-mile rule" will not apply to Phase II licensees (and it appears as though it will not), this rule must be eliminated as to Phase I licensees. There is no reason to distinguish between Phase I and Phase II licensees on this issue. To apply the "220 MHz 40-mile rule" to half of the participants in the 220 MHz service would discriminate unfairly against Phase I licensees and place them at a distinct competitive disadvantage vis a vis Phase II licensees, and undermine regulatory parity by and among all 220 MHz licensees.

- **The Original Rationale For The Rule No Longer Applies.**

The original purpose of the 40-mile rule was to prevent spectrum warehousing, particularly when the licensee did not pay fair market value for the license. To the extent there continues to be a concern with warehousing, strict enforcement of the construction requirements is a better way to address this concern. In today's environment, additional 220 MHz channels are purchased at fair market value, whether in Phase I or Phase II. These licensees have equal incentives, therefore, to use the frequencies to realize a prompt return on their investments.

- **Elimination of the Rule Fairly Balances The Interests of Phase I and Phase II Licensees.**

Elimination of the 220 MHz 40-mile rule for Phase I and Phase II licensees is important in order to achieve a fair balance between the interests of current and future 220 MHz licensees.

**a.** Early entrants, who have contributed to the development of the 220 MHz technology, should not be penalized by having their use of the spectrum restricted while newcomers are unrestricted.

**b.** Elimination of the 40-mile rule for Phase I and Phase II licensees does not adversely affect the Phase II Licensees (other than to make the Phase I Licensees more competitive with Phase II Licensees).